IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

CHARLES M. O'NEAL,	)	
	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.**
	)	
JAY CASSADY,	)	
in his official capacity as warden of	)	
Jefferson City Correctional Center,	)	
	)	
Respondent.	)	

PETITION UNDER 28 U.S.C. §2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Petitioner Charles M. O'Neal, by and through his counsel, for his Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. §§2241, *et seq*; 2254, states, alleges and avers the following:

1. Mr. O'Neal is a Missouri State inmate being held at the Missouri Department of Corrections, Jefferson City Correctional Center.

2. Respondent Jay Cassady is the warden of JCCC. He can be served with notification of this action at: 8200 No More Victims Road, Jefferson City, MO 65101.

3. Missouri Attorney General Joshua Hawley is entitled to notice of this action, and may be served with said notice at: Missouri Attorney General's Office, Supreme Court Building, 207 W. High St., P.O. Box 899, Jefferson City, MO 65102.

4. This case arises under 28 U.S.C. §§2241, *et seq*; 2254.

5. As such, jurisdiction is founded upon federal question jurisdiction located at 28 U.S.C. §1331.

6. Jefferson City Correctional Center is located in Jefferson City, Cole County, Missouri.

7. The Circuit Court of Randolph County, Missouri convicted and sentenced Mr. O'Neal.

8. Pursuant to 28 U.S.C. §2241(d), the location of the sentencing court is a proper venue.

9. Randolph County, Missouri is located in United States District Court for the Eastern District of Missouri.

10. Venue for actions arising in Randolph County is the Northern Division.

11. Therefore, jurisdiction and venue are proper in the United States District Court for the Eastern District of Missouri, Northern Division.

Procedural History

Criminal Case

12. Mr. O'Neal was charged by complaint in the Circuit Court of Howard County, Missouri Case Number 05H5-CR00427-01 on April 27, 2006, with one count of murder in the first degree, one count of assault in the first degree, and two counts of armed criminal action, and upon a change of venue, the case heard in Randolph County, Missouri.

13. On March 29, 2007, the Howard County prosecuting attorney, Mason R. Gebhardt, agreed to waive the death penalty in exchange for the defendant's plea to the charge of murder in the first degree. By its terms, the offer would expire May 16, 2007.

After that time, the State warned it would file notice with the court that it intended to seek the death penalty.

14. On September 10, 2008, Mr. O'Neal pleaded guilty to one count of second-degree murder, one count of armed criminal action, and one count of assault in the first degree.

15. On November 19, 2008, Mr. O'Neal was sentenced to terms of 30 years for second-degree murder pursuant to a negotiated recommendation by the State of Missouri, to ten years for armed criminal action, and to 15 years for assault in the first degree, both after an open plea and to be served consecutively.

16. On May 14, 2009, Mr. O'Neal filed a timely motion for post-conviction relief under Rule 24.035 seeking to withdraw his guilty plea and vacate these convictions.

17. On July 30, 2010, the circuit court set aside the prior guilty plea upon a finding that Mr. O'Neal's plea had been unknowing and involuntary, because he had been affirmatively misadvised about parole eligibility.

18. On August 31, 2010, the State again agreed it would not seek the death penalty and Mr. O'Neal agreed to waive a jury trial.

19. On January 26, 2011, the state was granted leave to file a second amended felony information reinstating the charge of murder in the first degree.

20. On December 1, 2011, the matter proceeded to a bench trial.

21. On December 1, 2011, the court rendered verdicts finding Mr. O'Neal guilty of Count I, murder in the first degree, Count II, assault in the first degree, and Counts III and IV, armed criminal action.

22. On December 19, 2011, the court sentenced Mr. O'Neal to terms of life imprisonment without the possibility of parole (Count I), 15 years (Count II), 20 years (Count III), and 20 years (Count IV), with the sentences on Counts I and II consecutive.

Direct Review

23. Mr. O'Neal appealed from the judgment of conviction.

24. The appeal was taken to the Missouri Court of Appeals for the Western District of Missouri, Case Number WD74687

25. Mr. O'Neal raised the following point of error on direct appeal: The trial court erred in overruling O'Neal's motion to suppress and in admitting at trial his interrogation statements made after he asserted his right to remain silent, because the court's ruling deprived O'Neal of his right to remain silent, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 19 of the Missouri Constitution, in that when O'Neal told the interrogating officer, "Man, I can't talk about it no more, dude" at the end of his second interview, and "I still don't feel like talking" at the beginning of his third interview, he invoked his right to remain silent, and by further questioning him, the detective failed to scrupulously honor O'Neal's rights, and his subsequent statements should have been suppressed.

26. The convictions were affirmed in an opinion dated March 12, 2013. *State v. O'Neal*, 202 S.W.3d 629 (Mo. App. 2006).

27. Mr. O'Neal did not seek transfer to the Missouri Supreme Court.

28. The Court of Appeals issued its mandate on April 3, 2013.

29. Mr. O'Neal did not file a petition for writ of certiorari with the United States Supreme Court as it relates to direct review.

29.15 – State Post-Conviction Relief

30. O'Neal thereafter filed a timely *pro se* Rule 29.15 motion for post-conviction relief on June 21, 2013.

31. O'Neal filed this action on in the Circuit Court of Randolph County, Missouri, where it was given Case Number 13RA-CV00652.

32. On October 17, 2013, appointed counsel thereafter filed a timely amended motion for Mr. O'Neal under Rule 29.15, alleging (1) that trial counsel failed to thoroughly investigate and call witnesses at trial, specifically Tarrell A. Huskey, Megan Brand, Matthew S. Hewerdine, Clifford Helmka, and Jeremy Barney, whose testimony would have impeached the testimony of Jered Forbes. The amended motion also alleged (2) that trial counsel failed to thoroughly investigate and call witnesses at trial whose testimony would have impeached the trial testimony of Milo Carson, specifically Terri Elliot, Donna Williams, Travis Palmer, Tracy Palmer Botkins, and Mike and Cindy O'Neal. The amended motion also alleged (3) that trial counsel was ineffective when admitting that Mr. O'Neal shot the victim during his opening statement. The amended motion also alleged (4) that Mr. O'Neal's judgment of conviction after trial was obtained in violation of his rights to effective assistance of counsel when his former post-conviction counsel in case number 09RA-CV00820 failed to meet his ethical duties to Mr. O'Neal to fully and completely counsel him regarding the risk of challenging his initial judgment of conviction for the same events after a guilty plea.

33. O'Neal was granted a hearing, which was held on June 30, 2014.

34. The relevant testimony is provided in more detail as it relates to any operative counts.

35. The motion court entered its findings of fact and conclusions of law denying post-conviction relief on December 3, 2014.

36. Mr. O'Neal sought review of this judgment in the Missouri Court of Appeals, Western District, a case that was assigned WD78273.

37. The Court of Appeals issued its *per curiam* order affirming the judgment on May 10, 2016.

38. Its mandate issued on June 1, 2016.

39. Mr. O'Neal did not file a petition for writ of certiorari with the United States Supreme Court as it relates to state post-conviction review.

Facts of the Case

40. In February 2007, Charles O'Neal and Amanda Kelly were involved in an on-again, off-again relationship. Amanda was staying in the same house in Howard County with her mother (Dawn Kelly), her mother's fiancé (Jared Forbes), her sister (Brooke Kelly), O'Neal's sister (Kelly O'Neal), and Kelly O'Neal's boyfriend (Tyrone Jackson).

41. Amanda had a child with Jeremy Barney. At one point Amanda had broken up with O'Neal and resumed her relationship with Barney, before reconciling with O'Neal. Amanda's relationship with Barney caused conflict with O'Neal. In February of 2007, Amanda broke up with O'Neal via letters that explained her reasoning. She placed the letters with clothing O'Neal had left at Dawn's house. Amanda expected that when O'Neal returned to get his clothes he would find the letters.

42. On February 9, 2007, O'Neal appeared at Dawn's house to speak with his sister Kelly and to retrieve his clothing. After picking up his clothes and Amanda's letters, O'Neal went to a friend's house and met Milo Carlson.

43. O'Neal told Carlson that Amanda had broken up with him and the two then left the friend's house, and went driving around, drinking beer. At some point, O'Neal suggested that they go shoot some beer cans. Milo Carlson retrieved a .22 caliber rifle and ammunition from his house.

44. O'Neal and Carlson went to a gravel road to shoot the rifle. O'Neal became distraught and began talking about Amanda. O'Neal complained that he had been mistreated by both Amanda and her mother Dawn. O'Neal ended the target shooting abruptly. O'Neal got into his truck, along with Milo Carlson. When both men were in the truck, According to Milo, O'Neal said he wanted to kill Dawn. O'Neal began driving to Dawn's house.

45. O'Neal and Carlson arrived at Dawn's house in the early morning hours of February 10, 2007. O'Neal got out of the truck but told Carlson to wait.

46. Four people were at the house: Dawn, Jared Forbes, Brooke Kelly, and Kelly O'Neal. Forbes was sleeping in the bedroom he shared with Dawn. Dawn and Kelly were in the living room and Brooke was in her bedroom listening to music on headphones.

47. O'Neal walked inside, and from her bedroom, Brooke heard Kelly yell, "Bubba [O'Neal] don't shoot me. Don't shoot me." Brooke then heard a gunshot and went to her bedroom door. Kelly ran past her in the hallway and jumped out a window. Brooke went to the living room and saw her mother, Dawn, sitting on the couch. Dawn appeared to

be sleeping. Brooke attempted to wake her. After slapping Dawn's cheeks and calling her name, Brooke realized that she had blood on her hands, and that Dawn had been shot.

48. While Brooke was in the living room with Dawn, O'Neal went to Dawn's bedroom and woke Forbes. O'Neal pointed the rifle at Forbes and told him that "I'm going to kill you like I did your wife." O'Neal ordered Forbes out of the bedroom, and made Forbes get on his knees.

49. O'Neal pointed the rifle at Forbes' head. Brooke saw O'Neal in the doorway of her mother' bedroom with a rifle, and exclaimed "Bubba, you shot my mom." When O'Neal turned toward Brooke, Forbes grabbed the barrel of the gun and pulled it so that the rifle was no longer pointed at him. O'Neal and Forbes began to struggle, and Forbes yelled for Brooke to call 911. Forbes struck O'Neal in the groin and O'Neal let go of the gun and stood up. O'Neal then left the house, threatening to return with another gun.

50. Forbes barricaded the front door and then checked on Dawn. She had been shot in the eye and was dead. Forbes picked up the rifle and stood against the door in case O'Neal returned with another weapon.

51. O'Neal returned to his truck. He told Carlson that Forbes had tackled him while he had the rifle pointed at Dawn, and that the gun had gone off accidentally. The two proceeded to O'Neal's parent's house, where O'Neal told them about the accidental shooting.

52. O'Neal remained at his parents' house until the police arrested him at approximately 2:00 a.m. on the morning of February 10. After being given *Miranda* warnings,

O'Neal told the arresting officer that "[h]e was tired of being fucked with and this time he fucked back."

53. O'Neal was taken to the Howard County Jail. Sergeant David Rice of the State Highway Patrol interrogated O'Neal at the jail on three separate occasions on February 10 at approximately 4:00 a.m., 8:00 a.m., and 1:00 p.m. At the beginning of each interview O'Neal was informed of his *Miranda* rights, and in each of the three interviews he signed a Notification of Rights form provided by Sergeant Rice.

54. In the first and second interviews O'Neal consistently told the officer the same thing he had told Carlson and his parents: that Forbes had unexpectedly tackled him from behind as O'Neal had the rifle pointed at Dawn, and that the gun had accidentally discharged.

55. In the third interview, O'Neal suddenly told a dramatically different tale: that while he held Dawn at gunpoint, she had refused to get Amanda on the telephone or tell O'Neal where Amanda was. O'Neal claimed that he started getting "really mad," and then "just kind of lost it." At that point, O'Neal stated that the gun went off, and Forbes confronted O'Neal after the shooting. When asked if he pointed the gun at Forbes or threatened to shoot him, O'Neal responded that "it's possible." O'Neal stated that he had no intention of shooting Amanda or Dawn when he drove to Dawn's house. He told the police he intended to shoot Barney, the father of Amanda's child, and then kill himself.

Claim 1

Trial court error in overruling O'Neal's motion to suppress and in admitting at trial his interrogation statements, made after the officer wrongly re-initiated contact, and made after he asserted his right to remain silent, a violation of the Fifth and Fourteenth Amendments to the United States Constitution.

56. Mr. O'Neal incorporates all other allegations of the Petition as if they were wholly set forth.

57. Mr. O'Neal was denied his right to remain silent and right against compelled self-incrimination.

58. In addition to the common facts set forth above, Mr. O'Neal would use the following facts to support this claim.

59. Mr. O'Neal was interviewed by Detective Rice three separate times after his arrest (LF 39, paragraph 2).[1] *Miranda* rights were read at the beginning of each interview (LF 39-40, paragraphs 2-5).

60. Mr. O'Neal was not told until the end of the second interview that Dawn Kelly was dead (LF 39-40, paragraph 4). After he was told, Mr. O'Neal stated, "Man, I can't talk about it no more, dude," and O'Neal ended the interview (LF 40, paragraph 4). About five hours later, Det. Rice re-initiated contact with Mr. O'Neal and attempted to interviewed him again (LF 40, paragraph 5). Mr. O'Neal told Det. Rice, "I still don't feel like talking." *Id.*

61. Det. Rice continued to question O'Neal, saying: "Let, well let me ask ya, did you mean for this to happen or was it just an accident?" (State's Exhibit 47, p 2). Mr. O'Neal said it was an accident. *Id.* Det. Rice responded:

> Charlie, I gotta tell you I, I want to believe you I, I really do want to believe it was an accident but, but the problem the problem like I said in the beginning man is that if, if, if ya hold out and, and ya lie about a little bit of the of what's going in your story I

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[1] O'Neal will cite to the trial transcript as "Tr." the direct appeal legal file as "LF" and the post-conviction transcript as "PCR Tr."

> mean straight up man people are gonna think that you're lying about the whole is the problem 'cause they're gonna think ah if he, if, if he's lying about this well he's full of crap about the rest of it too. And I, I think you're being straight up that, that you didn't intend for this to happen just I can tell by I mean people are gonna hear people are gonna hear about this and their gonna make up their opinion but they're not sitting right here they don't see what I see they don't see the emotion in your face, they don't see those tears rollin' down your cheek. I don't know what you're going through man but I feel what I feel you is what I'm saying. Those people aren't gonna know that, but the problem is what they're gonna hear is well hell Charlie lied about this and then Charlie lied about this about what happened and those are all things that we're gonna be able to prove because you're gonna have other people all these other people saying the same thing and it's gonna match up what we can prove you know what I mean do you hear what I'm saying?

(State's Exhibit 47, p 2). Mr. O'Neal agreed to talk to Det. Rice, but only if the tape recorder was turned off (LF 40, paragraph 5).

62. Det. Rice turned off the recorder and questioned Mr. O'Neal. The recorder was then turned on and Rice asked Mr. O'Neal additional questions (LF 40, paragraph 5). Mr. O'Neal then told Det. Rice that he went to Dawn's house to make her call Amanda (State's Ex. 49, p 1). Dawn refused and Mr. O'Neal pointed the gun at her (State's Ex. 49, p 2). Mr. O'Neal said he "just kind of lost it" (State's Ex. 49, p 3).

63. Det. Rice asked, "And that's when the gun went off. Okay, okay, you remember what you did after that? Or what happened after that?" (State's Ex. 49, p 3). Mr. O'Neal stated that Jared Forbes came into the room and they wrestled over the gun. *Id.* Mr. O'Neal then left. *Id.* When asked whether he pointed the gun at Jared or threatened to shoot him, Mr. O'Neal said he did not remember but it was "possible." *Id.* Mr. O'Neal stated he was drunk and mad and did not remember everything that happened. *Id.*

64. Rice then inquired, "…you told me you went to go get the gun from Milo because you were pissed off and you were gonna go back over to the house because you were gonna shoot Jeremy . . . Is that right?" (State's Ex. 49, p 5). Mr. O'Neal said it was. *Id.* Mr. O'Neal explained he and Milo had been drinking, and he told Milo he needed a gun to kill Jeremy and himself. (State's Ex. 49, p 7). He told Det. Rice that he had gone out to Dawn's house and talked to his sister at about ten at night, and asked her if anyone had talked to Amanda. (State's Ex. 49, p 8). His sister told him that Amanda had called Dawn's house and told her she was at Jeremy's house. *Id.* Mr. O'Neal said that he was upset because Jeremy was his best friend. *Id.*

65. Mr. O'Neal then told Det. Rice that he left, got more beer, drank all of it, and then went back out to Dawn's house. *Id.* He said that it was after talking to his sister that he told Milo he needed a gun and that he wanted to kill Jeremy (State's Ex. 49, p 8-9).

66. Mr. O'Neal filed a motion to suppress the statements he made in this third interview after he asserted his right to remain silent by telling Det. Rice that he did not feel like talking to him (LF 31-38; LF 34-35, paragraph 13). Mr. O'Neal alleged that his statement that he did not feel like talking invoked his right to cease the interrogation (LF 35-

37, paragraphs 15-22). He alleged his rights were violated when Det. Rice initiated the third interview (Tr. 86-87), and when Det. Rice continued to question him after he reasserted his right to remain silent soon after the third interview began and he said, "I still don't feel like talking" (Tr. 88; LF 36-37, paragraph 22-24). Mr. O'Neal argued that Det. Rice ignored this invocation of his right to remain silent (Tr. 90), and attempted to elicit incriminating statements from him by using coercive interrogation techniques (LF 37-38, paragraphs 23-26). He argued that what Det. Rice should have done is scrupulously honor Mr. O'Neal's right to remain silent as soon as Mr. O'Neal said, "I still don't feel like talking," referring to the invocation of his right to remain silent that he made at the end of the second interview that Det. Rice believed to be an invocation of his right to remain silent (Tr. 89).[2]

67. Mr. O'Neal asserted that the statements were obtained in violation of his rights under the 5th and 14th Amendments to the United States Constitution (LF 35, paragraph 14).

68. At a hearing on Mr. O'Neal's motion, Det. Rice testified that he was more aggressive in his questioning of Mr. O'Neal during the second interview (Tr. 22). When he told Mr. O'Neal that Dawn was dead, Mr. O'Neal became very upset, stood up, and said he did not want to talk about the incident anymore (Tr. 26). According to the officer, he believed Mr. O'Neal was not invoking "his right," instead he thought Mr. O'Neal was just upset and didn't want to talk about it anymore, so he stopped the interview (Tr. 26).

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[2] The Missouri Court of Appeals noted that Rice having ceased interrogation after the second interview when O'Neal said, "Man, I can't talk about it no more, dude," was evidence that Rice scrupulously honored O'Neal's invocation of his privilege against self-incrimination.

69. Det. Rice testified that he decided to interview Mr. O'Neal again about four and a half hours later (Tr. 27, 45). He reminded Mr. O'Neal that he had the right to remain silent, and Mr. O'Neal told him, "I still don't feel like talking" (Tr. 52). Det. Rice did not acknowledge that Mr. O'Neal said he did not feel like talking (Tr. 54).

70. Mr. O'Neal argued that an officer is not permitted to speculate that by saying, "I still don't feel like talking," Mr. O'Neal meant that he was too emotionally distraught to talk rather than it being an assertion of his right to remain silent (Tr. 83-84). Mr. O'Neal argued that he was clearly invoking his right to remain silent (Tr. 84).

71. The court took the motion under advisement (Tr. 90), and later issued an order overruling it (LF 39-42). The court concluded that the reasonable interpretation of Mr. O'Neal's statement "I can't talk about it no more" strongly suggests that, after being informed of Dawn's death, Mr. O'Neal's emotions had temporarily overcome his ability to speak (LF 41, paragraph 8). The court also found that Mr. O'Neal was still emotionally distraught at the beginning of the third interview several hours later, and his statement that he still did not feel like talking was ambiguous and equivocal and did not constitute a clear expression of his desire to exercise his right to remain silent. *Id.*

72. The Fifth Amendment to the United States Constitution states that "[n]o person … shall be compelled in any criminal case to be a witness against himself." *U.S. Const. Amend. V*. This provision applies to the States in all criminal prosecutions. *Dickerson v. United States*, 530 U.S. 428, 432 (2000).

73. A defendant has a right to cut off questioning that must be "scrupulously honored." *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). Courts must indulge every reasonable

presumption against a defendant's waiver of his right to remain silent. ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938).

74. The Missouri Court of Appeals denied this point finding that, first, O'Neal's invocation of his rights was not dishonored by Rice's initiation of the third interrogation session. "O'Neal's second interrogation ended immediately after O'Neal told [the police] he could not talk further." *State v. O'Neal*, 392 S.W.3d 556, 566 (Mo. App. 2013). It found there was "significant" amount of time, almost five hours, separating the second interrogation from the third; that O'Neal was freshly *Mirandized*, and there is no indication the third session was for the intent of wearing down O'Neal's resistance. *Id.*

75. The Missouri Court of Appeals further found that O'Neal did not "unequivocally" invoke his right to remain silent at the commencement of the third interview. *O'Neal*, 392 S.W.3d at 568. It found that O'Neal's statement "I still don't feel like talking" was not an unequivocal statement invoking his right to remain silent, based in part on his next sentence, which was "but I feel terrible." *Id.* at 570. The court found the "but I feel terrible" statement to demonstrate an "internal conflict." *Id.*

76. The appellate court's decision was an unreasonable application of *Miranda*, *Smith v. Illinois*, 469 U.S. 91 (1984), *Michigan v. Mosley*, 423 U.S. 96 (1975), and their progeny, as well as an unreasonable determination and application of the facts in the record.

77. The writ must issue and O'Neal is entitled to a grant of habeas relief.

Claim 2

Mr. O'Neal was denied his right to effective assistance of counsel when counsel failed to investigate and call Mike O'Neal as a witness at trial, a violation of the Sixth and Fourteenth Amendments to the United States Constitution.

78. Mr. O'Neal incorporates all other allegations of the Petition as if they were wholly set forth herein.

79. O'Neal received ineffective assistance of counsel by his trial counsel's failure to call Mike O'Neal as a witness. As such, O'Neal was prejudiced because the court was not given the opportunity to consider his testimony, which would have contradicted the trial testimony of Jared Forbes and Milo Carson.

80. Additional relevant facts adduced at the state post-conviction hearing are as follows: Had Mike O'Neal been called as a witness, he would have testified that O'Neal came to his house early on the morning after the shooting had occurred and told him and his wife that Dawn Kelly had been shot (PCR Tr. 30-31). He would have testified contrary to Milo Carson's testimony, O'Neal told them that contrary to Milo Carson had found a gun in the back of a Chevy pickup at a mechanic's shop and they went target shooting with it (PCR Tr. 31). O'Neal would have also testified that, regarding Dawn Kelly, O'Neal told him that Jared Forbes had grabbed him and the gun went off (PCR Tr. 31). In addition, O'Neal would have testified that, on that same morning, Milo Carson told him that he had found a gun in the back of a Chevy pickup and they had taken it to Dawn Kelly's house to sell it to Jared Forbes, and that Carson told him he heard an argument before the gunshot (PCR Tr. 34).

81. He would have also testified that Milo Carson seemed surprised to learn that Dawn Kelly was dead and that Milo Carson never stated that O'Neal had told him that he was going to kill Dawn (PCR Tr. 34-35). Mike O'Neal would have further testified that in February, 2007, after the shooting, Jared Forbes had said to him regarding the shooting,

"Nothing would have happened if I hadn't grabbed him," and when O'Neal asked Forbes what he meant, Forbes said, "I've talked too much now." (PCR Tr. 40-43).

82. O'Neal's counsel testified that she recalled speaking with Mike O'Neal, but she did not remember the specifics of those conversations (PCR Tr. 54-57). She did recall some concern about the credibility of some of the potential witnesses, but she did not specifically remember why witnesses were not called (PCR Tr. 66-67). Mike O'Neal testified, though, that counsel indicated that they were not going to call any witnesses and that they never spoke to him about testifying at trial (PCR Tr. 37-39, 43-44).

83. Such testimony from Mike O'Neal would have served to refute the trial testimony of Jared Forbes regarding how the shooting allegedly took place and the trial testimony of Milo Carson regarding how the gun was obtained and O'Neal's alleged statement that he was going to kill Dawn Kelly. Mike O'Neal's testimony would have cast doubt on their credibility, and would have called into question the reliability of the story being told by Jared Forbes and Milo Carson. Such testimony would have raised doubts about the veracity of Forbes' and Carson's testimony, and such doubts would have likely resulted in the court acquitting O'Neal of the charges, or convicting him of a lesser charge. Had Mike O'Neal been called as a witness, there is a reasonable probability that the outcome of O'Neal's trial would have been different.

84. A claim of ineffective assistance of counsel must meet a two-pronged standard. Under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), O'Neal must show that his counsel failed to exercise the customary skill and diligence that a reasonably competent

attorney would perform under the same or similar circumstances, and that this deficiency prejudiced his defense. *Id.*[3]

85. The Missouri Court of Appeals found that trial counsel was not ineffective for failing to call Mike O'Neal as a witness. *O'Neal v. State* (WD78273), Slip op. at 8. But the Missouri Court of Appeals' decision was an unreasonable interpretation of *Strickland*, and also an unreasonable determination of the facts. Trial counsel's performance was deficient and O'Neal was prejudiced as a result.

86. The writ must issue, and O'Neal is entitled to a new trial.

Claim 3

Mr. O'Neal was denied his right to effective assistance of counsel when counsel failed to investigate and call Tarrell Huskey as a witness at trial, a violation of the Sixth and Fourteenth Amendments to the United States Constitution.

87. Mr. O'Neal incorporates all other allegations of the Petition as if they were wholly set forth herein.

88. O'Neal received ineffective assistance of counsel by his trial counsel's failure to call Tarrell Huskey as a witness. As such, O'Neal was prejudiced because the court was not given the opportunity to consider his testimony, which would have contradicted the trial testimony of Jared Forbes, a vital state witness.

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[3] As to each ground alleging ineffective assistance of counsel in this petition, O'Neal refers to and invokes the right to effective assistance of counsel as provided in the U.S. Const. Amend. VI, made applicable to the states by U.S. Const. Amend. SIV, and governed by *Strickland*, *Evitts v. Lucey*, 469 U.S. 387 (1985), and their progeny. All grounds for relief are either fully exhausted and preserved, or O'Neal can demonstrate legal cause the prejudice for failing to exhaust and preserve them. With respect to prejudice, while O'Neal contends each of the grounds is sufficiently prejudicial to require reversal, he alternatively requests that the court consider whether the cumulative effect of the grounds sustained is sufficiently prejudicial to require relief.

89. O'Neal's trial counsel was aware of Tarrell Huskey as a potential witness prior to trial (PCR Tr. 8-9, 37-39, 54-56, PCR L.F. 81-84, 89, 91-93, 97-99). And Huskey was available to testify and would have testified, if called (PCR L.F. 46-47). O'Neal's trial counsel did not remember any investigation into Tarrell Huskey (PCR Tr. 60, 66-67, 73). Though she could not specifically remember why witnesses were not called, she did recall some concern about the credibility of some of the potential witnesses (PCR Tr. 60, 66-67, 73)

90. If Tarrell Huskey had been called to testify, he would have testified that he was longtime friends with Jared Forbes, that he knew O'Neal through Forbes and Amanda Kelly, but he did not know Dawn Kelly (PCR L.F. 41-42). He would have also testified that, a couple of months after Dawn Kelly had been shot, Jared Forbes told him that he had been wrestling O'Neal over the gun, that during the struggle the gun went off, and that Forbes believed he had pulled the trigger (PCR L.F. 43-45, 66). Huskey would have further testified that, about two weeks after that first conversation, he and Jared Forbes were in Forbes' truck, and Forbes again told him that he and O'Neal had been wrestling over the gun and the gun went off during the struggle (PCR L.F. 45-46, 66).

91. Reasonably competent counsel would have spoken with Huskey to determine his potential testimony. An interview of Tarrell Huskey would have revealed that the shooting did not occur as Jared Forbes testified at trial, but rather, as a result of a struggle between Forbes and O'Neal over the gun.

92. The Missouri Court of Appeals found that trial counsel was not ineffective for failing to call Terrell Huskey as a witness. *O'Neal v. State* (WD78273), Slip op. at 9. But the Missouri Court of Appeals' decision was an unreasonable interpretation of *Strickland*, and

also an unreasonable determination of the facts. Trial counsel's performance was deficient and O'Neal was prejudiced as a result.

93. The writ must issue, and O'Neal is entitled to a new trial.

Claim 4

Mr. O'Neal was denied his right to effective assistance of counsel when counsel failed to investigate and call Donna Williams as a witness at trial, a violation of the Sixth and Fourteenth Amendments to the United States Constitution.

94. Mr. O'Neal incorporates all other allegations of the Petition as if they were wholly set forth herein.

95. O'Neal received ineffective assistance of counsel by his trial counsel's failure to call Donna Williams as a witness. As such, O'Neal was prejudiced because the court was not given the opportunity to consider her testimony, which would have contradicted the trial testimony of Milo Carson, a vital state witness.

96. O'Neal's trial counsel was aware of Donna Williams as a potential witness prior to trial (PCR Tr. 8-9, 37-39, 54-56, PCR L.F. 81-84, 89, 91-93, 97-99). And Williams was available to testify and would have testified, if called (PCR Tr. 24-25). Reasonably competent counsel would have spoken with Williams to determine her potential testimony. An interview of Donna Williams would have revealed that O'Neal and Milo Carson had not obtained the gun as Carson testified at trial, and that O'Neal had not told Carson that he was going to kill Dawn Kelly. Donna Williams would have testified if interviewed and called. Moreover, her testimony would have aided O'Neal's defense. Williams' testimony would have contradicted the trial testimony of a vital state witness regarding how the gun had been obtained and O'Neal's alleged statement that he was going to kill Dawn Kelly. Donna

Williams' testimony was readily discoverable with reasonable investigation by O'Neal's trial counsel. Williams indicated that she was never contacted by O'Neal's trial attorneys (PCR Tr. 24-25). O'Neal's trial counsel did not remember Donna Williams [O'Neal] at all (PCR Tr. 60, 66-67, 73).Though she could not specifically remember why witnesses were not called, she did recall some concern about the credibility of some of the potential witnesses (PCR Tr. 60, 66-67, 73).

97. If Donna Williams [O'Neal] had been called to testify, she would have testified that she had gone to O'Neal's parents' house on the night Dawn Kelly was shot and stayed through the afternoon the next day (PCR Tr. 18-20). She would have also testified that about 10:30 that morning, Milo Carson emerged from the bedroom and O'Neal's father started speaking with him (PCR Tr. 21-22). Williams would have testified that Carson stated that he and O'Neal found the gun in the back of a truck on Fayette square (PCR Tr. 22). And she would have further testified that Carson was shocked to learn that Dawn Kelly was dead and that Carson never stated that O'Neal had told him that he was going to kill Dawn (PCR Tr. 22-23).

98. The writ must issue, and O'Neal is entitled to a new trial.

Claim 5

Post-conviction counsel failed to litigate prior counsel's ineffectiveness in failing to advise O'Neal of the risks of withdrawing his guilty plea and negotiated sentence to the charge of second-degree murder, a violation of the Sixth and Fourteenth Amendments to the United States Constitution.

99. Mr. O'Neal incorporates all other allegations of the Petition as if they were wholly set forth herein.

100. In his amended post-conviction motion filed under Rule 29.15, O'Neal

alleged: Movant's judgment of conviction, after trial, was obtained in violation of his rights to effective assistance of counsel when Movant's former post-conviction counsel, case number 09RA-CV00820, failed to meet his ethical duties to Movant to fully and completely counsel Movant regarding the risk and ramifications of challenging his initial judgment of conviction for the same events as charged in Case Number 07H5-CR00058-03.

101. As more fully explained above, O'Neal reached an agreement with the State to enter a plea of guilty to a reduced charge of murder in the second degree with a sentence of thirty years, without agreed-upon sentences as to the other counts.

102. On November 19, 2008, O'Neal was sentenced to serve consecutive sentences of thirty, ten, and fifteen years, respectively. He filed a timely Rule 24.035 post-conviction motion, was appointed counsel, and on August 27, 2009 filed an amended motion, represented by Gary Brotherton. After a hearing, the court entered a judgment on July 30, 2010 vacating O'Neal's sentence and judgment in Case Number 07H5-CR00058-02.

103. Throughout the course of this post-conviction case, counsel failed to fully explain to O'Neal's understanding the risk of his sentence and judgment being vacated. O'Neal did not know he would be subject to the original charge of murder in the first degree and the mandatory punishment for that charge of death or life without the possibility of probation or parole. O'Neal was prejudiced by his lawyer's failure to meet the ethical duty of any lawyer to fully explain the risk of litigation.

104. O'Neal was prejudiced because he is now serving life without the possibility of

parole, when previously he was parole-eligible. Had he fully understood the risk of challenging his prior judgment and sentence he would not have proceeded under Rule 24.035.

105. While counsel Steven Harris raised this claim in his amended motion he filed on behalf of O'Neal, he did not litigate this claim at the hearing on the motion held on June 30, 2014.

106. Post-conviction counsel was ineffective for not litigating this claim. A reasonably competent lawyer in similar circumstances would not have abandoned this claim by not presenting evidence on the claim.

107. This issue was not exhausted in state court due to counsel's ineffectiveness. The failure to raise this claim was because of the ineffective assistance of O'Neal's counsel. Should the State argued this ground is not available for review, O'Neal will argue that under *Martinez v. Ryan*, 566 U.S. 1 (2012), he is entitled to develop and present this ground for relief in this court.

108. The writ must issue, an evidentiary hearing will be necessary, and upon a hearing, O'Neal is entitled to entry of a sentence and judgment for the charge of second-degree murder, or, in the alternative, a new trial..

Representation at Proceedings

109. Mr. O'Neal was represented by Charles Moreland and Don Catlett in Randolph County 07H5-CR00058-01.

110. Mr. O'Neal was represented by Gary Brotherton in Randolph County 09RA-CV00820.

111. Mr. O'Neal was represented by Thomas Jacquinot and Carie Allen in Randolph County 07H5-CR00058-03.

112. Mr. O'Neal was represented by Stephen Harris in 13RA-CV00652.

113. Mr. O'Neal was represented by Mark Grothoff in WD78273.

114. Mr. O'Neal is represented by N. Scott Rosenblum and Jessica Hathaway during this habeas corpus proceeding.

Timeliness

115. Pursuant to 28 U.S.C. §2244(d), this action is filed within one year of the date on which the judgment became final by the conclusion of direct review, where the time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending is not be counted toward the same.

116. As more fully set forth above: the Missouri Court of Appeals issued a decision denying O'Neal's direct appeal on March 12, 2013. O'Neal commenced post-conviction proceedings on June 21, 2013, and the proceedings for state post-conviction relief concluded on June 1, 2016.

117. Based on the above, the Petition for Habeas Corpus is Charles timely filed within §2244(d)'s one year statute of limitation.

118. Mr. O'Neal has no other sentences to serve after completion of the judgment being challenged herein.

Relief Requested

WHEREFORE, Petitioner Charles M. O'Neal prays that this Court issue its Writ of Habeas Corpus; that it vacate his sentence, granting him immediate release from detention; and for any other relief to which Petitioner is entitled.

Respectfully submitted,

/s/ Jessica Hathaway

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